Supreme Court of the United States

October Term, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK,

Appellants,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES MARSHALL, constituting The Board of Education of The City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Appellees,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

Intervenor-Appellee.

Appeal from the Court of Appeals of the State of New York

BRIEF OF APPELLEE, THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

January 28, 1952

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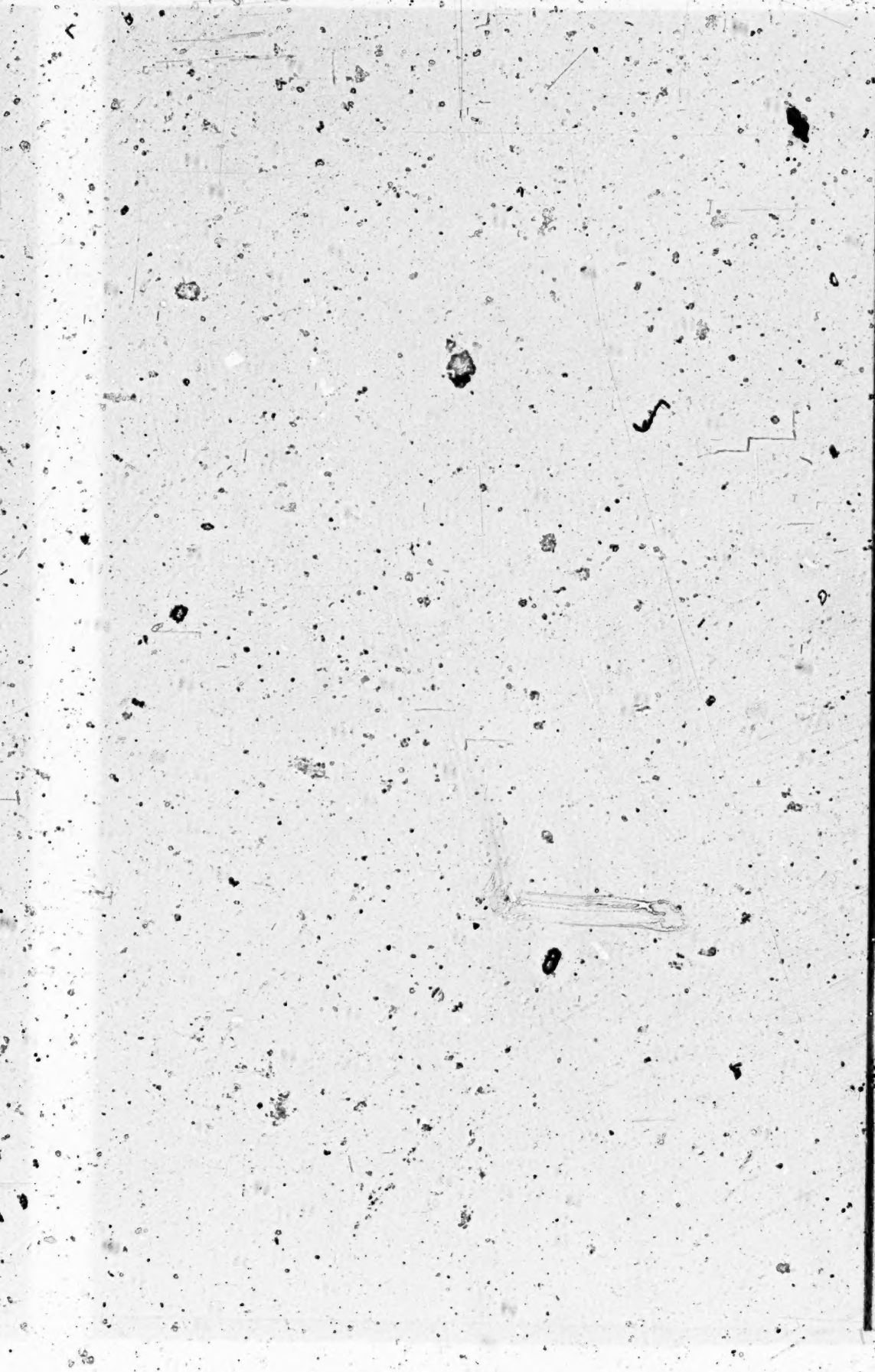

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Opinions Below

Appellants, in their capacity as citizens, taxpayers and parents of children in two of the public schools of the City of New York commenced this proceeding under Article 78 of the New York Civil Practice Act for an

order, in the nature of mandamus, compelling the appellees to perform a duty allegedly specifically enjoined by law,* that is, to rescind their respective regulations respecting the released time program in New York City. The basis for the relief was the asserted unconstitutionality of Education Law, §3210, subd. 1b which permits absence for religious observance and education under rules that the State Commissioner of Education shall establish.

The Supreme Court, Kings County (DiGiovanna, J.), upon consideration of the appellants' petition, the respective answers of the appellees with accompanying affidavits, the answer of the intervenor-appellee, and the appellants' reply papers, dismissed the petition on the merits as a matter of law (R. 6-10). The Court's opinion is reported in 198 Misc. 631 (R. 81-98).

The order of dismissal was affirmed by the Appellate Division of the Supreme Court (two Justices dissenting) 278 App. Div. 573 (R. 107-111) and by the Court of Appeals (one Judge dissenting) 303 N. Y. 161 (R. 114-141).

Jurisdiction

Appellants invoke the jurisdiction of this Court under Title 28 U. S. C. §1257, as an appeal from a final judgment of the highest Court of a State rejecting an attack on a State statute and rules and regulations established pursuant thereto claimed to be in conflict with the First and Fourteenth Amendments to the Federal Constitution. The decision of the Court of Appeals was rendered on July 11, 1951 (R. 114). This appeal was allowed by the Chief Judge of the Court of Appeals on September 24, 1951 (R. 145). On December 11, 1951 this Court noted probable jurisdiction (R. 154).

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* New York Civil Practice Act, §1296.

The Provisions of the Constitution and Statute Involved

The First Amendment to the United States Constitution, so far as is material, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

While this amendment refers specifically only to Congress, this Court has held that the prohibitions imposed upon Congress by the First Amendment constitute, by virtue of the Fourteenth Amendment, prohibitions against the States and those acting under color of State power. *Everson* v. *New Jersey*, 330 U. S. 1 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

New York Education Law, §3210 which is part of the Compulsory Education Law (Education Law, Article 65), so far as is material, provides:

> "Amount and character of required attendance.
>
> 1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending. b. *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*" (Italics supplied.)

Although the full text of Section 3210 as well as Education Law, §3204, being also a part of the Compulsory Education Law, are set forth as an appendix to this brief (*infra*, pp. 48-51), we believe it would be well here to point out that Education Law, §3204 subd. 1 provides in part that a child required to attend upon instruction may attend the public school or elsewhere.

The Questions Presented

The practice of releasing children in the public schools at the request of their parents for one hour a week to receive religious education is popularly known as the released time program. The constitutional question presented is whether the New York released time statute (Education Law, §3210, subd. 1b) and the released time program as operated in the City of New York pursuant to the respective rules of the Commissioner of Education and of the local Board of Education contravene the First Amendment to the United States Constitution.

We state the proposition more generally. The New York City Board of Education is mindful of and obedient to the constitutional and statutory ban against sectarian teachings in the public schools. The Board of Education also recognizes the right of parents to direct the upbringing and education of their children. Is not the released time program here involved compatible with both the Constitution and the stated right of parents to direct the education of their children? Does such release of children stand on a footing different from the release of children for whole days at a time for religious observance? Is this minimal degree of cooperation between school and parents, the only purpose of which is to foster and encourage the well rounded education of the child, to be condemned under the "establishment of religion" clause of the First Amendment merely because, as an incident thereto, religion generally or some sect in particular may also be involved? So long as the public schools are not used for denominational purposes are the States or local Boards of Education nevertheless to be denied the opportunity to experiment with various arrangements looking towards the solution of the dilemma of recognizing the need of religious training for our youth?

Statement of the Case

(1)

There is no dispute as to the material facts.

The petition in substance recites the basic statute and regulations under which the New York released time program operates, and asserts their illegality and unconstitutionality on divers grounds which we shall hereinafter discuss.

The Board of Education's answer and accompanying affidavits set forth the Board's regulations as well as those of the Commissioner of Education under which the released time program operates in the City of New York, and such other facts as demonstrate that the New York City released time program is so different from the Champaign plan involved in the *McCollum* case (*McCollum* v. *Board of Education*, 333 U. S. 203 [1948]), and so completely free from the features condemned by this Court in the *McCollum* case, as to render the New York plan immune from any constitutional objections.

(2)

The constitutionality of a released time program substantially similar to the one under attack here was sustained by the New York Court of Appeals in 1927, *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195.

Following that case the Legislature enacted L. 1940, ch. 305 (hereinafter referred to as the released time statute), which amended Education Law, §625 (renumbered §3210), by adding thereto as subd. 1b, the following sentence:

> "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

Released Time Regulations Promulgated by the Commissioner of Education

In pursuance of the released time statute the Commissioner of Education, on July 4, 1940, issued the following regulations which are still in force and effect (R. 29-30):

"1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.

2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Released Time Rules Adopted by the Board of Education of the City of New York

In compliance with the released time statute and the regulations of the Commissioner of Education, the Board of Education of the City of New York, on November 13, 1940, adopted the following rules to govern the operation of the released time program in New York City (R. 30-32):

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that

in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The foregoing rules have been continued in effect without change except Rule No. 4 which was amended by the Board of Education on September 24, 1941, to read as follows:

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

The Operation of the Released Time Program in New York City

In his affidavit in support of the answer interposed herein on behalf of the Board of Education of the City of New York, Superintendent of Schools William Jansen describes the operation of the released time program in New York City. He states (R. 32-34):

"The parent who desires to have his child released for religious instruction signs a card in the form substantially as follows:

'REGISTRATION FOR RELEASED TIME RELIGIOUS INSTRUCTION

New York City ..... 194..

To ..... Principal of ..... School

Please excuse my child, ...

of grade ..... one hour weekly on

..... throughout the rest of this school

year, beginning ..... to go for

religious instruction at .....

.....

(Name of Center to which child is to go)

(a) .....

(Signature of parent or guardian)

Address ..... Phone .....

(b) Provision has been made to accommodate and instruct this pupil

.....

(Signature of Clergyman)

(Card to be retained and filed by the Public School)

RS-1'

Such registration cards are prepared and distributed either by 'The Greater New York Coordinating Committee on Released Time', a committee wholly independent of our city schools, or by the particular religious organization conducting the religious instruction. Neither the Board of Education nor its school principals, teachers, or other employees participate in any way in the distribution of such cards. Further-

more, the distribution of the cards is not permitted within the public schools. The preparation or printing of the cards involves no expense on the part of the Board of Education of the City of New York. When the card is received by the principal of the school, the principal notifies the teacher of the class wherein the pupil named in the card is enrolled, that such pupil is to be released at 2:00 p.m. on the day designated for religious instruction in that borough. At the appointed time—2:00 p.m.—without further announcement by the teacher in the classroom the child leaves the class and the school grounds and proceeds for religious instruction to the location specified by the religious organization. The dismissal of those pupils who participate in the released time program is effected in the same manner as the normal dismissal of pupils at the close of the school day.

The rules of the Board of Education provide that the religious organization is to notify the school principal each week of the attendance or absence of pupils upon religious instruction. In the event that a pupil is absent from religious instruction three times, the religious organization requires the parent to revoke the permission for the release of such pupil. Thus, the responsibility for the pupils' attendance upon their religious instruction is assumed solely by the religious organizations in cooperation with the parents.

The registration cards are not available or used by the school authorities for any purpose other than as a record of pupils entitled to be excused."

Chief Characteristics of the Released Time Program in New York City

Superintendent Jansen summarizes the chief characteristics of the released time program in New York City as follows (R. 35-36):

"(a) The religious instruction is given outside the school buildings and grounds.

(b) The released time program is entirely permissive and voluntary. The pupil is excused for religious instruction only upon the joint written request of his parent or guardian and the particular religious organization.

(c) The absence of the pupil is limited to one hour a week, such hour to be the last hour of the school session. All the pupils of all religious faiths participating in the released time program are excused at the same time on the same day in the particular borough.

(d) The released time program is open to any religious organization, in cooperation with the parents of the pupils concerned, who desire to participate therein.

(e) The religious organizations, in cooperation with the parents, assume full responsibility for attendance at the religious center and for the program of religious instruction thereat.

(f) The released pupils are dismissed from school in the usual way as in the case of other permitted absences.

(g) The school authorities have no responsibility beyond that assumed in regular dismissals.

(h) The parent's written request for the excuse of the child is filed with the school and is not available or used for any other purpose.

(i) The religious organization files with the school principal a card attendance record for each pupil excused from the school pursuant to the parent's request.

(j) There is *no comment* by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction.

(k) The planning necessary to accommodate pupils on released time is no greater than or different from that required when large numbers of pupils are absent in the schools of the City of New York for the purpose of observing religious holidays or by reason of inclement weather or serious illness in any particular community.

(l) The operation of the released time program entails no expenditure of public moneys."

Summary of Argument

I

The New York City released time program is different from the Champaign plan involved in the *McCollum* case in such vital respects as to render the New York plan immune from constitutional objection.

(1) Released Time, *per se*, is not unconstitutional.

(2) The Champaign Plan for Released Time

(3) Distinguishing Characteristics of the Champaign Plan and the New York City Plan

II

The released time program as operated in New York City does not violate the First and Fourteenth Amendments of the Constitution.

(1) The New York adjudications on released time

(2) The New York statute authorizing released time

(3) The "wall of separation between Church and State"

(4) The "wall of separation" is a relative concept

(5) The educational justification for released time

(6) The New York released time program strikes a proper accommodation or balance between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people.

(7) The alleged "divisiveness" of the program

III

There are no triable issues of fact.

POINT I

The New York City released time program is different from the Champaign plan involved in the *McCollum* case in such vital respects as to render the New York plan immune from constitutional objection.

(1)

Released Time, *per se*, is not unconstitutional.

The appellants contend that the New York City released time program has been outlawed by the decision of this Court in the *McCollum* case, 333 U. S. 203 (1948). We confidently assert that no such result was intended by this Court. From a reading of the several opinions in the *McCollum* case, it becomes readily apparent that the constitutionality of a released time program is to be tested by a consideration of the particular program under scrutiny. Certainly, this was the view expressed by Mr. Justice FRANKFURTER in his concurring opinion when he said (p. 225):

> "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to

protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.

The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. * * * "

And further (p. 231):

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable."

It may be noted that Justices JACKSON, RUTLEDGE and BURTON joined in the concurring opinion of Mr. Justice FRANKFURTER.

And, in a separate concurring opinion, Mr. Justice JACKSON stated (p. 237):

"The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice pre-

vails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error. * * * "

In a dissenting opinion, Mr. Justice REED held that even the "Champaign Plan" for released time was free from constitutional objection.

Thus four justices of the United States Supreme Court held that all released time programs as a "generalized conception" are not unconstitutional; one justice held that a released time program, even though attended by the characteristics of the Champaign plan, would not be violative of the principle of separation of church and state. It is, therefore, evident that of the then justices of the United States Supreme Court, at least five of the justices comprising the then majority of the Court, declared that released time programs are not *per se* unconstitutional. Rather, there must be a detailed analysis of the particular released time program under consideration before the constitutional test can be applied.

The appellants' case is predicated almost entirely upon a few isolated phrases contained in the opinion of Mr. Justice BLACK writing for the majority of the Court. But it is plain from a reading of the entire opinion of Mr. Justice BLACK that even he had no intention of passing in blanket terms upon the abstract issue of released time in general. On the contrary, his opinion dealt in painstaking detail with the particular facts of the particular program in force in the City of Champaign. It was to those facts and to that program that his opinion was directed.

Our view, therefore, is that the decision in the *McCollum* case must be considered only in the light of the factual aspects of the Champaign plan.

(2)

The Champaign Plan for Released Time

As an aid to the Court, we quote Mr. Justice FRANKFURTER's summary of the facts with respect to the method of operation of the Champaign released time plan (p. 226):

> "Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, 'subject to the approval and supervision of the Superintendent.' The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent 'who in turn will determine whether or not it is practical for said group to teach in said school system.' If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant."

To the foregoing may be added an additional element involved in the Champaign plan whereby the school children participating in the released time program were segregated by the school authorities in separate school

rooms according to the respective religious faiths of the pupils. Counsel for the appellant in the *McCollum* case, in his brief on appeal to this Court, summarizes the evidence in the record of that case with respect to the segregation of the pupils as follows:

> "All students in the elementary classes were classified, and the several groups were segregated by the school authorities. Separate rooms were provided for Protestants, Catholics and Jews (Transcript, 105, 150, 229), although there has been no Jewish instruction for several years (Transcript, 224, 229). The Protestant group being dominant in number, the regular class rooms were usually employed for their religious teaching during what were otherwise public school class hours, with the public school teacher remaining in the room during the religious instruction (Transcript, 92, 133, 137). The Catholics were assigned other rooms (Transcript, 150). Those in the elementary grades who did not take religious education remained in their class rooms if those taking religious education went elsewhere (Transcript, 147, 249); otherwise they went elsewhere (Transcript, 248). The son of the appellant in this case was once sent to sit alone in the corridor (Transcript, 132)."

(3)

Distinguishing Characteristics of the Champaign Plan and the New York City Plan

We have set forth, *supra*, pages 11-12, a summary of the chief characteristics of the New York City plan. That the New York City plan for released time differs in "crucial respects" from the Champaign plan is evident from the factual analysis made of each plan by the Superintendent of Schools of the City of New York. Dr. Jansen's comparative analysis, which is outlined in his

affidavit in support of the Board's answer herein, is reproduced below (R. 37-38):

Champaign Plan	*New York City Plan*
1. No underlying enabling State statute.	1. Education Law §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish".
2. Religious training took place in the school buildings and on school property.	2. Religious training takes place outside of the school buildings and off school property.
3. The place for instruction was designated by school officials.	3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.	4. No element of segregation is present.
5. School officials supervised and approved the religious teacher.	5. No supervision or approval of religious teachers of course of instruction by school officials.

Champaign Plan	*New York City Plan*
6. Pupils were solicited in school buildings for religious instruction.	6. School officials do not solicit or recruit pupils for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.	7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils isolated or removed to another room.	8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
	9. No credit given for attendance at the religious classes.
	10. No compulsion by school authorities with respect to attendance or truancy.
	11. No promotion or publicizing of the released time program by school officials.
	12. No public moneys are used.

We believe that the foregoing comparison demonstrates that the unconstitutional aspects of the Champaign plan do not exist in the New York plan.

As pointed out by Judge FROESSEL of the New York Court of Appeals in upholding the constitutionality of the released time program involved in the case at bar (303 N. Y. at p. 169):

> "In the instant case, there is no 'use' of tax supported 'property or credit or any public money' 'directly or

indirectly' 'in aid or maintenance' of religious instruction * * * and there is no such co-operation as in the *McCollum* case (*supra*) between the school authorities and the religious committee in promoting religious education."

The prop of the appellants' case is the *McCollum* decision. But we believe we have shown that the *McCollum* decision is bereft of any weight or support for the position taken by the appellants in this case. We suggest that if any released time program is to wear the mantle of constitutional blessing, certainly it is the New York City program which is devoid of the features condemned by this Court in the *McCollum* case.

POINT II

The released time program as operated in New York City does not violate the First and Fourteenth Amendments of the Constitution.

(1)

The New York adjudications on released time

The appellants assert that the New York released time program is in violation of the First and Fourteenth Amendments of the Constitution of the United States. Simply stated, the appellants' argument is that in no event may school children be excused for one hour a week to attend upon religious instruction. This, they say, is unconstitutional, pointing to the decision of this Court in the *McCollum* case. We deem it unnecessary to argue further that the New York City released time program is so crucially different from the Champaign plan that the *McCollum* decision cannot aid the appellants.

In 1926, a proceeding against the Commissioner of Education of the State of New York was instituted

wherein the legality and constitutionality of a released time program as then operated in the City of White Plains was challenged. As pointed out by JUDGE FROESSEL, writing for the majority in the New York Court of Appeals in the instant case, the released time program there under attack, except for the absence of a State enabling act, was essentially the same program that is in operation today in the City of New York. The petitioner's contention that the White Plains program was unconstitutional in that it violated the principle of separation of Church and State was successively rejected at Special Term, the Appellate Division and the Court of Appeals. *People ex rel. Lewis* v. *Graves*, 127 Misc. 135 (Sup. Ct. Albany Co., 1926), aff'd 219 App. Div. 233 (3rd Dept., 1927), aff'd 245 N. Y. 195 (1927).

Judge POUND of the New York Court of Appeals, writing for a unanimous court, its other distinguished members having been Chief Judge Cardozo, and Judges Crane, Andrews, Lehman, Kellogg and O'Brien there said (pp. 198-199):

> "A child otherwise regular in attendance may be excused for a portion of the entire time during which the schools are in session, to the extent at least of half an hour in each week, to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or

any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school.

The separation of the public school system from religious denominational instruction is thus complete. Jealous sectaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

Two years before the decision of the New York Court of Appeals in the *Lewis* case this Court had "assumed" that the First Amendment has been made applicable to the States by virtue of the due process clause of the Fourteenth Amendment (*Gitlow v. New York*, 268 U. S. 652, 666 [1925]). Lewis, in his petition, had urged the unconstitutionality of the released time program under "the constitutional guarantees of the New York State and the United States Constitutions respecting religious liberty and the separation of church and state." Nevertheless, the New York Court of Appeals in that case as well as in the instant case held that the released time program did not breach the "wall of separation" between church and state.

Parenthetically, it may be added that no sooner had this Court handed down its *McCollum* decision than the self same Lewis, who had been unsuccessful in 1927 in his efforts to strike down the City of White Plains released time program again came to the fore. He, like the appellants here, sought to have the New York courts declare the New York City released time program unconstitutional by reason of the *McCollum* decision. In the record of that proceeding, as in the case at bar, the Board of Education

fully set forth the factual operation of the New York released time program. Again Mr. Lewis was rebuffed. The Court found the New York plan to be so dissimilar from the *Champaign* plan as to be free from constitutional objection. *Matter of Lewis* v. *Spaulding*, 193 Misc. 66 (Sup. Ct., Albany Co., 1948), appeal withdrawn, 299 N. Y. 564 (1949).

(2)

The New York statute authorizing released time

The first *Lewis* case was followed by the enactment of New York Laws of 1940, ch. 305, which amended Education Law, §625 (renumbered §3210) by adding thereto as subd. 1b the following sentence:

> "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

Thus the Legislature evidenced its approval of the decisions by the Courts in the *Lewis* case, and sanctioned the existing practice of released time on a state-wide basis.

In approving and signing the released time statute, Governor Lehman (now Senator) said (R. 27-29):

> "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.
>
> For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws.

In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'

However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

With particular reference to the statute under consideration it would not be amiss to point out the rule, well grounded in constitutional law, that statutes enjoy a presumption of constitutionality. Indeed, it is only when a statute is palpably unconstitutional that a court will so adjudicate. The reason for the rule is that the courts will not be quick to frustrate the will of the people. In *Atkin* v. *Kansas*, 191 U. S. 207 (1903), this Court said (p. 223):

"But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

(3)

The "wall of separation between Church and State"

The appellants argue that the New York released time program is unconstitutional in that it violates the principle of separation between church and state. Taking refuge behind the "wall of separation between Church and State," and disregarding any attempt to define just where the "wall" is to be built, the appellants argue that this "wall" is a constitutional barrier to the operation of the New York released time program. We disavow any attempt to move or tear down the "wall." The released time program as operated in the City of New York renders the "wall" nonetheless "high and impregnable." In the administration of the public schools of the City the principle of separation between church and state is ever maintained with commensurate recognition that a parent has the basic constitutional right to direct the educational training and nurture of his child. We quote from the affidavit herein of William Jansen, Superintendent of Schools of the City of New York (R. 39):

> "In the administration of our public schools the Board of Education recognizes that such schools are non-sectarian and the instruction therein is confined to the secular. However, we also recognize the right inherent in a parent to direct the training and nurture of his child and that the child is not the mere creature of the state. The 'released time program' as operated in the City of New York does nothing more and nothing less than to recognize such fundamental rights and principles. The secular instruction and the religious instruction are kept within their respective spheres. The principle of separation of church and state is thus kept inviolate."

The quoted statement of Dr. Jansen is consonant with the views expressed by this Court in *Pierce* v. *Society of*

Sisters, 268 U. S. 510 (1925). In that case, this Court declared unconstitutional an Oregon statute which would have confined the education of every child to secular instruction, thus, in effect, outlawing the parochial school system. In enunciating and reaffirming the principle that parents and guardians alike possess the fundamental liberty "to direct the upbringing and education of children under their control," this Court said (at p. 535):

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In *Prince v. Massachusetts*, 321 U. S. 158 (1944), this Court again declared (p. 166):

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

This Court espoused the same principle in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

From the *Pierce* case, we deduce the principle that if a parent has the right to have his child receive full time instruction in the parochial schools, it follows as a necessary corollary that the parent has the right to have his child receive part time instruction in the public schools and part time instruction in the parochial schools. Thus, if we consider that full time instruction in the public schools comprises 25 hours a week, and a child can be excused from attendance in the public schools for the full

25 hours a week on condition that he attend instruction elsewhere, it would follow quite logically that the child may be excused from attendance in the public schools for 1/25th of the 25 hour school week for the purpose of attending some other recognized place of instruction.

The released time program carries out this principle to the letter. A child participating in the New York released time program attends the secular school for 24 hours of the 25-hour school week, and upon the parent's request the child attends at religious instruction for the remaining hour, or 1/25th of the school week.

Dr. Pertsch, an Associate Superintendent of Schools, sums up the situation quite effectively when he states (R. 45):

> "The instructional machinery of our city schools is so geared as to comply in all respects with the provisions of the 'compulsory education law.' Such compliance is unaffected by the excused absence of pupils for one hour per week for the purpose of attending upon religious instruction. Those pupils who remain in school when others are released for religious instruction are given significant education work with emphasis on individual and remedial instruction. The pupils who are released are given comparable instruction, as the opportunity may present itself, at other times during the school week. In any event, the requirements of the 'compulsory education law' are fully observed and administered alike to *all* pupils both as to 'required attendance' and as to imparting instruction in the subjects mandated by Education Law, §3204, subd. 3."

Under well established principles, the holding of the highest Court of the State of New York in construing the Compulsory Education Law to be consistent with the New York City plan of released time is binding on this

Court. *Winters* v. *New York*, 333 U. S. 507, 514 (1948); *Morehead* v. *New York*, 298 U. S. 587 (1936).

In our view the released time program before this Court cannot be said to breach the wall of separation between Church and State one whit more than the existence of a parochial school system, as sustained in the *Pierce* case. The Board of Education has done no more than give effect to the parent's request that his child be released from school one hour each week for religious instruction which the child cannot receive in the public school.

(4)

The "wall of separation" is a relative concept

We are not unmindful that, in referring to the breadth and scope of the First Amendment, some of the Justices of this Court in the *Everson* case (330 U. S. at pp. 15-16) and in the *McCollum* case (333 U. S. at pp. 210-211) stated:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

This is a far cry from supporting the argument now advanced by the opponents of released time. The metaphorical concept embodied in the expression "wall of separation between church and State" must be evaluated, we insist, with regard to the precise factual situation in each particular case and cannot be applied indiscriminately and as an absolute.

The unmitigated unthinking of our opponents in urging the elevation of the metaphor to an absolute is to argue in a vacuum and leads to absurdity.

Moreover, the unrestricted, unlimited and unreasoned acceptance of the metaphor would fly in the face of our national tradition and give rise to all sorts of illogical and incongruous results. For example, it would be unlawful for Congress to appropriate moneys for the payment of salaries to the Chaplains in our Armed Forces or to those who, from earliest times, have opened each session of the Congress with prayer. Religious services at public hospitals to comfort the sick and dying and in penal institutions to give spiritual aid to the imprisoned and solace to the condemned would be banned. The New York State and United States provisions for the form of an oath, thereby invoking moral sanctions for the proper administration of justice and the machinery of government, would be unconstitutional. (New York Civil Practice Act, §§360-365; 5 U. S. C. 16*; 28 U. S. C. 453.) Tax exemption for religious institutions and tax deductions for contributions to religious organizations would be invalid (26 U. S. C. 101 subd. 6; New York Tax Law, §360 subd. 10). Invoking of the Deity in Thanksgiving proclamations or to assist our Armed Forces would be stopped. Reference to our trust in God would have to be eliminated from our coins. The Constitution of the State of New York

* The oath prescribed by 5 U.S.C. 16 for any person elected or appointed to any office of honor or profit either in the civil, military or naval service, except the President of the United States, is as follows: "I, AB. do solemnly swear (or affirm) that I will support and defend the Constitution of the United States * * *. So help me God."

would in itself be unconstitutional at the point in its preamble where it expresses gratitude to an "Almighty God" for our freedom. Laws making Christmas and Sunday legal holidays would be bad (New York General Construction Law, §24). Laws providing for the incorporation of ecclesiastical bodies would have to be stricken out. Denominational colleges would be barred from receiving students under the "G.I. Bill of Rights." Religious groups would be barred from holding meetings in public parks. But see *Saia* v. *New York*, 334 U. S. 558 (1948). Public school children would be barred from singing "America", part of which is a prayer to God to "protect us by Thy might," "God Bless America" and so much of "America the Beautiful" which recites:

> "God shed his grace on thee and crown thy good with brotherhood."

That such illogical results were not contemplated by this Court in its definition of the meaning of the First Amendment is clear from the holding in the *Everson* case in which this Court first referred to the wall separating Church and State, see *supra*, p. 29. In the *Everson* case this Court sustained the power of a local school board to pay the transportation charges of children attending a Catholic parochial school. Can it be denied that the religious school thereby received an indirect or incidental benefit?

Furthermore, this Court did not overrule either *Cochran* v. *Louisiana*, 281 U. S. 370 (1930) or *Bradfield* v. *Roberts*, 175 U. S. 291 (1899). In the *Cochran* case this Court sustained the State's purchase of textbooks for all school children including those attending parochial schools. And in the *Bradfield* case an appropriation to a Catholic hospital was sustained.

Nor has this Court ever overruled its earlier statement that ours is a religious nation and that the stability of our government rests upon the basis of a belief in God.

Church of the Holy Trinity v. *U. S.*, 143 U. S. 457 (1892). And in *People* v. *Friedman*, 302 N. Y. 75 (1950), appeal dismissed for want of a substantial Federal question 341 U. S. 907 (1951), this Court refused to entertain an appeal from a ruling of the New York Court of Appeals that the New York Sunday Laws (Penal Law, Art. 192) were constitutional in the face of an attack that they violated the "establishment of religion" clause of the First Amendment.

We regard with particular significance the following statement in the *Everson* case made by Mr. Justice BLACK (330 U. S. at p. 18):

> "State power is no more to be used to handicap religions than it is to favor them."

Can it be denied that the appellants seek to "handicap religions" when they say, in effect, "you must deny the parents' request and refuse to excuse school children for one hour a week for religious instruction." Are not the appellants seeking to stifle that very freedom of religion guaranteed to us by the Constitution?

Separation of Church and State is a relative concept. There is no such thing as a completely free church in a free state or a state without religious influences. Our churches must be built in accordance with our building codes and firelaws and indeed their legal incorporation is regulated by State law. On the other hand, the State has repeatedly availed itself of religion by invoking the moral sanctions of oaths, in looking to God as the creator of our "inalienable rights" (The Declaration of Independence) and in the many other ways previously alluded to which make up the warp and woof of our American way of life. Indeed the Constitution itself recognizes Sunday as a non-business day. *U. S. Const. Art. I, Sec. 7.* cf. *People* v. *Friedman*, 302 N. Y. 75 (1950), appeal dismissed for want of a substantial Federal question, 341 U. S. 907 (1951).

In *People* v. *Friedman, supra,* the New York Court of Appeals, in sustaining the constitutionality of the "Sunday laws" and in rejecting an attack that they violated the First Amendment, recognized that they may be said to have had a religious origin but that they since have come to serve a proper State purpose of providing for a regular day of rest. In upholding the Sunday laws, the Court said (302 N. Y. at p. 79):

> "It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion."

The Supreme Court of New Jersey in the "bible reading case", *Doremus and Klein* v. *Board of Education of the Borough of Hawthorne and the State of New Jersey,* 5 N. J. 435; 75 A. 2d 880 (Oct. 16, 1950), appeal pending in this Court, sustained the constitutionality of reading a portion of the old testament and the recitation of the Lord's prayer in the public schools. The Court, in rejecting the applicability of the *McCollum* decision, stated (75 A. 2d at p. 886):

> "Cooley (Constitutional Limitations, Eighth Edition, Vol. 2, p. 966) lists five things which are not lawful under any of the American constitutions, namely, (1) any law respecting an establishment of religion, (2) compulsory support, by taxation or otherwise, of religious instruction, (3) compulsory attendance upon religious worship, (4) restraints upon the free exercise of religion according to the dictates of the conscience, (5) restraints upon the expression of religious belief. But, he adds (p. 974), 'while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain

no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite (sic) and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws."

The rule which evolves from an analysis of the several cases in this and other Courts and our national tradition would seem to require a recognition of the distinction between religion as a functional experience of mankind and religion as institutionalized by various churches and sects, between religion *per se* and sectarianism, between a recognition of our Judaeo-Christian culture and tradition and the dogma, creed, tenets and doctrines of the separate faiths.

(5)

The educational justification for released time

Family life in America today has been falling apart in a manner approaching a debacle. The alarming divorce rate is one symptom. The dislocations caused by World War II, the Cold War and the Hot War are undoubtedly contributing causes. Modern city living in apartments, not homesteads, differences in family interests and occupations and leisure time activities, increasing individualism and selfishness in the home as manifested by an insistence on one's rights and not on one's duties or obligations have all contributed to the disease. Economic pressures compelling mothers to work have also left their

mark. As a consequence, whether we like it or not, many of our children and youth have no stabilizing recollection of normal happy home life.

The released time program is one effort to bring a stabilizing influence into the lives of children. The educational authorities in making available one hour a week for religious education outside of the school are attempting to discharge their duty to their students of providing a well rounded and properly grounded education. They are trying to do this within the framework of our constitutional system which bars sectarian religious instruction in the schools.

Dr. Jansen justifies the released time program as a proper educational experience for the children who participate in these words (R. 39):

> "The view is widely shared among educators that since religion has to do with the highest values and aspirations of man it must play an essential role in education. From the mental hygiene point of view, it is important that children grow up in the security of those basic spiritual values which are woven into their cultural heritage. A sound religious education helps the individual to withstand conflicting stresses within the personality, to develop self-respect and true humility, to define values, to accept goals beyond immediate personal satisfaction, to make sacrifices for the general good, and to be truly tolerant of other races and religions. All of these qualities are essential to a well integrated personality."

It is no argument against released time to say that sectarian religions are thereby aided. That is not the dominant or direct purpose of the program. The purpose is to give the child the opportunity to receive what it is impossible for the schools to give. We state the proposition more specifically. The New York released time pro-

gram is not in "aid" of religion. Rather, it complements the *secular* program of education.

In hundreds of ways the State in general and the schools in particular are daily called upon to compensate for the deficiencies of home life and the neglect of parents. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); *People* v. *Pierson*, 176 N. Y. 201 (1903).

Giving youth an appreciation of fundamental moral and spiritual values, concededly a proper educational purpose,* may be said to aid religion by providing the apperceptive basis upon which religions may build in furtherance of their own programs. Would appellants, in logical progression, urge that such instruction is banned by the First Amendment?

Today there is an unquestioned need for a moral regeneration whether it comes through religious training or some other means. It is not proposed that the schools provide religious training—but why may not the parents, through their representatives sitting as the Legislature and as the Board of Education, devise a program whereby parents may request the schools to at least make possible the doing of an act for which there is a public need? Thus the released time program makes possible the correction of a cultural defect now existing in many American homes, a defect with which the schools themselves are powerless to deal.

In this program there is no teaching of religion in the public schools. In releasing children for only one hour a week to enable the child to receive religious instruction the school is but rounding out its educational tasks. An educated person cannot be religiously illiterate.

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* *Moral and Spiritual Values in the Public Schools*, Educational Policies Commission of the National Education Association of the United States and the American Association of School Administrators, 1951.

(6)

The New York released time program strikes a proper accommodation or balance between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people.

An accommodation must be struck between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people. Such reservation of power has been manifested in this case by the New York Legislature and the local Board of Education in providing for a released time program, since it has been demonstrated that such program serves a proper educational purpose. That such program may be said indirectly or incidentally to involve religion in some degree or coincide with the desires of religious leaders, is immaterial from a constitutional point of view. Illustrations of other situations going so far as to confer some incidental benefit to religion but which have been found to be constitutionally unobjectionable are *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Cochran* v. *Louisiana*, 281 U. S. 370 (1930); *Bradfield* v. *Roberts*, 175 U. S. 291 (1899); *People* v. *Friedman*, 302 N. Y. 75 (1950), appeal dismissed, 341 U. S. 907 (1951).

If we approach the problem of the true meaning of the First Amendment with respect to its guarantee of religious liberty, "or prohibiting the free exercise thereof [religion]", we come to the same conclusion—namely, that a reconciliation or accommodation of conflicting rights must be made. This, of course, is always a delicate matter.

Thus, in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) the State's attempt to compel all children to attend at the public schools had to give way to the parent's paramount right to educate his child in accordance with the parent's religious beliefs. In *West Virginia* v. *Barnette*, 319 U. S. 624 (1943), so much of the State's attempt to compel all children to salute the flag had to give way to

the religious convictions of some children that saluting the flag was a form of worship to a graven image contrary to their religious beliefs. In *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), a State's attempt to have only English taught in all schools had to give way to the parent's right to have his children educated in other languages.

But in *Reynolds* v. *United States*, 98 U. S. 145 (1878), the individual's religious belief in polygamy had to give way to the State's ban on bigamy. In *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), the individual's belief that his religion compelled his children to go on the public highways to propagandize their religion had to give way to the State's law prohibiting child labor. A person's religious scruples constituted no exemption from the State's requirement to bear arms or compulsory military training, *In re Summers*, 325 U. S. 561 (1945); *Hamilton* v. *Regents*, 293 U. S. 245 (1934). See also *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

From an analysis of the above cases we deduce the principle that a delicate accommodation must be arrived at in each case with due weight being given to the individual's right to freedom of religious expression on the one hand and the State's duty to all citizens of providing for their mutual health, safety, morals and general welfare. Stated in another way, the State's effort to provide for the general welfare, safety and morals of its citizens will not be struck down where as an *incident* to such program religion or a religion is indirectly a factor. To what extent religion is but an *incident* in the latter cases, or in what direction the scales of accommodation are to be tipped in the former cases, is a matter to be decided in each particular case, due regard being given to all the relevant facts and circumstances.

In many spheres the interests of the State and of religion coincide.

Instances of the concededly valid exercise of State power which happen to coincide with the desires of re-

ligious leaders readily come to mind. That most religions sanctify marriage does not mean that the State cannot also make laws looking toward the permanency of the marriage ties. That Sunday is considered the Sabbath does not bar the State from making Sunday a day of rest. *People* v. *Friedman, supra.*

In the *McCollum* case, Mr. Justice JACKSON warned against giving unrestricted scope to the Court's opinion without laying down some limitations. At pages 235-236 he said:

> "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.
>
> While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explana-

tion of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."

With special reference to the case at bar, we believe that it has been amply demonstrated that the released time program serves a public and educational need. The fact that such program coincides with the desires of religious leaders and of the parents of children voluntarily availing themselves of the released time program is an inadequate reason for striking it down. See *Everson* v. *New Jersey, supra, Cochran* v. *Louisiana Board of Education, supra.*

(7)

The alleged "divisiveness" of the program

Appellants argue—unsupported by any facts—that the released time program has a divisive effect upon the public school children. The fact is that the rules of the Board of Education, instead of having a divisive effect upon the children, provide that all the pupils of all religious faiths participating in the released time program are to be excused at the same time on the same day in any one particular borough and are to be dismissed from school in the usual way and without comment. Misfeasance on the part of any or some school principals in permitting a malfunctioning of the released time regulations is no condemnation of the constitutionality of the released time program in New York City. Any abuses pointed to by the appellants are matters for intra-departmental attention. We call the Court's attention to the magnitude of the New York City school system—a school system that has over 850 school buildings, more than 38,000 teachers, and almost a million pupils. A misunderstanding of the rules and regulations concerning released time may well happen somewhere along the line in an organization of such vast scope. Any deviations from the regulations are solely matters for administrative action by the Board of Education and do not militate against the constitutionality of the program as such.

True it is that divisiveness was present in the *McCollum* case. There, the pupils were segregated according to their respective religious faiths and taught in separately designated classrooms within the school building. Often the religious instruction was given in the presence of the nonparticipating pupils. None of these features of divisiveness is present in the New York City released time program. Important, too, is the rule that no comment of any kind is made in the classroom regarding the attendance or nonattendance of any pupil upon religious instruction.

It is significant that nowhere in the petition do the appellants allege that the rules of the Board of Education are being conciously and purposefully manipulated and abused so as to bring about a pattern the dominant and active purpose of which is to aid religion. There is, thus, no unconstitutional administration of the rules. *Snowden* v. *Hughes*, 321 U. S. 1 (1943); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

The rules of the New York City Board of Education properly place the entire released time program on a voluntary basis. Release of the children for religious instruction is dependent solely upon the wishes of the parents. Appellants argue nevertheless that an illegal and unconstitutional divisiveness is thereby brought about. We submit that the right to disagree with the advisability of the released time program does not have as its offspring the right to prevent others from joining the program. Mr. Justice JACKSON expressed it quite aptly in the *McCollum* case when he said (333 U. S. at p. 232):

> "* * * here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

To be consistent, appellants must also argue that the excused absences of children for whole days at a time for the purpose of religious observances of holy days is

unconstitutional because it leads to the most obvious "divisiveness". Children of one religion stay home from school on their holy days while the other children attend school. On other holy days other children stay home in order to attend worship. Is there anything more obviously divisive than such observance of holy days? Would petitioners ban such holy day observances? To do so, however, would fly in the face of one of the most fundamental constitutional guarantees, namely, the right of religious liberty.

Recognition of this fundamental right as being consistent with our American tradition was given by this Court in *Holy Trinity Church* v. *United States,* 143 U. S. 457 (1892). This Court said (p. 465):

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because *this is a religious people.* This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation." (Emphasis added.)

POINT III

There are no triable issues of fact.

The appellants contend that there are issues of fact in this proceeding warranting a trial thereof. They argue that inasmuch as the respondents (appellees herein) submitted affidavits in support of their respective answers they thereby acknowledged that there are triable issues of fact in the case. In support of this argument the appellants quote New York Civil Practice Act, §1291 to the effect that:

> "The respondent shall also serve and submit with the answer affidavits, made by a person having knowledge of the facts, or other written proof, showing such evidentiary facts as shall entitle him to a trial of any issue of fact."

Civil Practice Act, §1291 specifically requires a respondent to support the answer with affidavits setting forth the evidentiary facts so that the Court, on the hearing of the application, forthwith may make such final order as may be warranted by the facts.

Indeed, the New York Court of Appeals has construed Section 1291 to the effect that an answer containing bare denials of the allegations contained in the petition without an affidavit setting forth the respondent's version of the matter in issue amounts practically to a default and a confession that the petitioner is entitled to the relief sought. *Matter of Ackerman* v. *Kern*, 256 App. Div. 626, 630 (1st Dept., 1939), aff'd 281 N. Y. 87 (1939).

The requirement that affidavits containing evidentiary matter be submitted with the respondent's answer simulates the practice in Article 78 proceedings with that obtaining in motions for summary judgment under Rule 113 of the New York Rules of Civil Practice. The New York State Judicial Council in its 3rd Annual Report for the year 1937 at p. 186, in recommending the adoption of the then proposed Article 78 to the Civil Practice Act, stated:

> "The purpose of the requirement that affidavit or other written proof be submitted with the answer, is to enable the court to make a summary disposition of the cause where there are no triable issues of fact, along the lines of Rule 113 of the Rules of Civil Practice. The language of this portion of the proposed section is derived from Rule 113."

This Court in adopting the Federal Rules of Civil Procedures, Rules 12 and 56 providing for summary judgment, has accomplished the same result.

Just as summary judgment may be granted to either party upon the facts contained in affidavits, so also in Article 78 proceedings the Court, upon the hearing of the application and upon considering the pleadings, affidavits and the evidentiary facts referred to therein, may make a

final order granting or denying the relief unless there be *triable* issues of fact.

The appellants made no reply to the matters contained in the answer and accompanying affidavits submitted on behalf of the Board of Education. The answer and accompanying affidavits submitted by the Board of Education contain a detailed description of the operation of the New York City released time program. Pursuant to Civil Practice Act, §1292 the appellants could have replied thereto setting forth such matters in their reply and reply affidavits as would controvert the allegations of fact in the defendant's answer. Having failed to reply, the facts in defendant's answer and accompanying affidavits are deemed to be true. *Matter of Hines* v. *LaGuardia*, 293 N. Y. 207, 215 (1944).

An examination of the pleadings and affidavits in this proceeding demonstrates that there are no issues which warrant a trial. The appellants' allegations that the released time program *necessarily* entails use of the school machinery to aid religion or *inevitably* results in coercion upon parents or children or results in divisiveness, and similar allegations are merely conclusions of law and not statements of fact. Indeed, these phrases are taken bodily from the language employed by the Justices of this Court in their discussion of the *McCollum* case. Nowhere does the petition allege that the rules are being administered to accomplish an intentional or purposeful discrimination. *Snowden* v. *Hughes*, 321 U. S. 1 (1944); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

The appellants labor under the misapprehension that the petition was dismissed on its face for failure to state a cause of action; that only the petition was considered. In this they are in error. The petition was dismissed as a matter of law upon a consideration of *all* the facts in the case—the petition, the answers of the respective appellees, the affidavits in support of this appellee's answer and the appellants' reply and reply affidavits. The order of dismissal specifically recites the fact that the Court read

and considered all the papers, not the petition alone, in arriving at the conclusion that the New York released time program was in all respects constitutional (R. 8).

Appellants are careful to make no claim that the granting or denial of relief under Article 78 without a trial deprives them of rights without due process of law. Their claim in substance, is that a trial in this case would have shown some isolated instances of deviations from the rules. Based on such proof (even though it were not excluded on the grounds of immateriality and irrelevancy) the appellants would then have the inference drawn that the released time statute and the rules thereunder are unconstitutional. The Courts of New York properly held it would be pointless to have a trial, the effect of which would be to allow the appellants to develop such a magnificent *non sequitur*. The papers in the case were sufficiently detailed to give a clear picture of the New York released time system without the necessity of resorting to a trial.

Summary judgment without a trial, where there are no triable issues has been held by the New York Court of Appeals to be constitutional both under the Federal and State Constitutions. *Stewart* v. *Ahrens*, 273 N. Y. 591 (1937). The disposition of the instant case without a trial raises no Federal question.

The entire factual situation descriptive of the New York released time program has been presented to the Court in the pleadings and the affidavits. Such facts are barren of any triable issue. Thus, there is left for the Court's determination solely a question of law. Is the New York released time program constitutional?

CONCLUSION

The New York released time program is in nowise violative of the letter or spirit of the First Amendment of the Constitution.

The New York program does not breach the "Wall of separation between Church and State".

There is compelling educational justification for the New York released time program.

The New York program strikes a proper accord between the First Amendment prohibition against the "establishment of religion" and the right of parents to direct the education and training of their children.

The New York released time program is so vitally different from the Champaign plan as to render the New York plan free from constitutional objection. Hence as the New York Court of Appeals held, the *McCollum* decision is not at all controlling here.

A majority of the Justices of this Court were in agreement in the *McCollum* case that "released time" *per se* is not unconstitutional. A detailed analysis of the New York program—sanctioned by legislative enactment and operated within the limitations prescribed by the respective rules of the New York State Commissioner of Education and the New York City Board of Education—impels the conclusion that such program fully meets and withstands the test of the Constitution.

The order of the New York Court of Appeals should be affirmed in all respects.

January 28, 1952

Respectfully submitted,

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Appendix

Relevant Provisions of the New York Education Law with regard to Compulsory Education

§3204. **Instruction required.**

1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the eleven common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York state.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history.

b. For part time day schools. The course of study of a part time public day school shall include such subjects as will enlarge the civic and vocational intelligence and skill of the minors required to attend.

c. For evening schools. In a public evening school instruction shall be given in at least speaking, reading, and writing English.

d. For parental schools. In a parental school provision shall be made for vocational training and for instruction in other subjects appropriate to the minor's age and attainments.

e. Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

b. A part time day school or class shall be in session each year for at least four hours of each week during which the full time day schools are in session.

c. Evening schools shall be in session each year as follows:

(1) In cities having a population of one hundred thousand or more, on at least one hundred nights;

(2) In cities having a population of fifty thousand but less than one hundred thousand, on at least seventy-five nights;

(3) In each other city, and in each school district where twenty or more minors from seventeen to twenty-

one years of age are required to attend upon evening instruction, on at least fifty nights.

5. Subject to rules and regulations of the board of regents, a pupil may be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporation law.

§3210. **Amount and character of required attendance.**

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

e. Registration of certain private schools. No person or persons, firm or corporation, other than the public school authorities or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school giving instruction in the ten common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene and physical training, unless the school is registered under regulations of the commissioner. Upon complying with the said regulations and after payment of a fee of twenty-five dollars a certificate of registration shall be issued by the department which shall be valid for a period of two years from the date of issuance unless suspended or revoked within said period pursuant to said regulations. Such registration may be renewed bienially[1] thereafter upon the payment of a renewal registration fee of twenty-five dollars.

[1] Probably should read "biennially".